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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ATAIN SPECIALTY INSURANCE
COMPANY,
Plaintiff,
v.
DANIEL SOTO, et al.,
Defendants.

Case No. [17-cv-00573-MMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT;
GRANTING IN PART AND DENYING IN
PART DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT; VACATING
HEARING DATE**

Re: Dkt. Nos. 38, 40

Before the Court are plaintiff Atain Specialty Insurance Company's ("Atain") and defendant Daniel Soto's ("Soto") cross-motions for summary judgment, filed January 19, 2018, and February 2, 2018, respectively.¹ The matters have been fully briefed. Having read and considered the papers filed in support of and in opposition to the motions, the Court deems the matters appropriate for determination on the parties' respective written submissions, hereby VACATES the hearing scheduled for March 2, 2018, and rules as follows.

1. The parties agree that an insurance company's duty to defend arises when "facts available to [the insurance company] at the time of tender of defense," see CAN Casualty of California v. Seaboard Surety Co., 176 Cal. App. 3d 598, 605 (Cal. Ct. App.

¹ The two other defendants named in the instant action, JTS Tree Service, Inc. and Jose M. Soto, have not, to date, appeared, and are in default. (See Doc. No. 26.)

1 1986), reveal “the possibility of covered claims,” see Scottsdale Ins. Co. v. Transp., 36
2 Cal. 4th 643, 57 (Cal. 2005). Here, contrary to Atain’s contention, for which it provides no
3 authority, the operative date of tender is August 17, 2016, the date on which Atain
4 received from Soto a copy of the underlying complaint and request for a defense, not
5 August 30, 2016, the date on which Atain obtained records from which, Atain argues, it
6 first learned there was no possible coverage under the policy at issue. See Atlantic
7 Mutual Ins. Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1038 (Cal. Ct. App. 2002)
8 (finding delivery of complaint to insurance company, which complaint, on its face,
9 revealed “the possibility of coverage[,] . . . sufficient, at that moment, to create . . . duty to
10 defend”) (emphasis omitted); see also Montrose Chemical Corp. v. Superior Court, 6 Cal.
11 4th 287, 295 (Cal. 1993) (noting “[i]mposition of an immediate duty to defend is
12 necessary to afford the insured . . . the full protection of a defense”).

13 Accordingly, as of August 17, 2016, Atain had a duty to defend Soto in the
14 underlying action.

15 2. There is no dispute that the underlying complaint is based on statements
16 concerning the identity of the employer of Jairo Ramos (“Ramos”), which statements
17 were first published prior to the effective date of the subject policy, specifically, in the
18 course of the California Department of Industrial Relations’ (“DIR”) investigation into the
19 circumstances surrounding Ramos’ injury, which investigation closed on January 10,
20 2015, seven months before the beginning of the policy period. (See Compl. Ex. A at 1
21 (defining policy period as “From: 08/13/2015 To: 08/13/2016”). Contrary to Soto’s
22 contention, the underlying complaint cannot reasonably be read to be based on any
23 additional statements other than related statements, if any, made at the same time as the
24 statements made to the DIR. The Court previously considered this issue (see Order, filed
25 May 16, 2017), and, having reviewed the underlying complaint in the context of the
26 instant motions, finds no reason to depart from its previous determination.

27 Accordingly, given the policy’s “First Publication Exclusion” (see Compl. Ex. A at
28 53), Atain has shown there is no possibility of coverage.

1 3. Where a duty to defend arises and, as here, the “insurer subsequently
2 develop[s] facts showing there was no duty in the particular circumstances,” the “insurer’s
3 duty to defend ceases prospectively from the [court’s] subsequent determination but not
4 retroactively to the beginning.” See Scottsdale Ins. Co., 36 Cal. 4th at 661 (internal
5 quotation, citation, and emphasis omitted); see also CAN Casualty of California, 176 Cal.
6 App. 3d at 610 n.6 (holding, “even though the insurer receive[s] a declaratory judgment in
7 its favor[,] . . . it [is] not retroactively relieved of its defense obligations”).

8 Accordingly, Atain is not entitled to reimbursement of the cost of its defense of
9 Soto in the underlying action.

CONCLUSION

11 For the reasons stated above, the parties' respective motions are hereby
12 GRANTED in part and DENIED in part as follows:

13 1. As to the First Cause of Action, by which Atain seeks declaratory relief, Atain's
14 motion is hereby GRANTED, Soto's motion is hereby DENIED, and the Court hereby
15 DECLARES Atain has no duty to defend Soto in the underlying action.

16 2. As to the Second Cause of Action, by which Atain seeks a monetary judgment
17 against Soto for the cost of defense, Atain's motion is hereby DENIED and Soto's motion
18 is hereby GRANTED.

IT IS SO ORDERED.

21 || Dated: February 26, 2018

Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge